event that Chuan Hin could not discharge the pro-perty. The property was not discharged. However, the sum of $300,000 was not refunded to the first defendant. The second defendant explained that he had placed the money in a fixed deposit and on 25 June 1983, he withdrew the money and gave it to Kim Hiong, as payment for the purchase of lands by Chuan Hin from Kim Hiong. (Again there is no evidence from Kim Hiong to confirm this explanation as true.)

Rather than supporting his contention of honest dealing with his client's money this evidence, in my view, clearly shows that the second defendant had flouted his undertaking to the first defendant without any compunction on his part as early as 1982. The conclusion which can be drawn from this is that the second defendant had misappropriated the loan granted to Chuan Hin contrary to his duty as a stakeholder to the first defendant. In those circumstances, it is reasonable to infer that the first defendant had looked to the second defendant to make good the loss suffered by the first defendant.

Following that unpleasant event, the first defendant, not heeding his past experience, released the plaintiffs' present loan to the second defendant and retained him as its solicitor, ignoring the first plaintiff's protest. On the basis of the foregoing, the first defendant is not blameless for the plaintiffs' loss.

The whole evidence has given rise to the irresistible conclusion that there had been collusion between the first and second defendants to defraud the plaintiffs. For these reasons I find that the first defendant is equally liable in tort and would give judgment to both the plaintiffs as prayed. In respect of the first plaintiff's claim for loss and damages, no argument has been advanced during trial. I would reschedule arguments for these after the period of appeal.

Order accordingly.

Solicitors: *Wong & Paramjothy; Mah Weng Kwai & Associates; Subra Naicker & Co; E Ramasamy & Co.*

Reported by *PS Ranjan*

Petaling Rubber Estates Ltd v Collector of Land Revenue, Kedah

HIGH COURT (ALOR SETAR) - LAND REFERENCE NO 27 OF 1985
LIM BENG CHOON J
12 JUNE 1989

Land Law - Compensation - Fair market value of land - Principles of assessment - Consequential loss - Surveyors' fees - Land Acquisition Act 1960, First Schedule s 3(e)

The applicants ('objectors') were the owners of a rubber holding measuring 2,890.37 acres in size. A part of the holding measuring 20 acres in size was acquired compulsorily under the Land Acquisition Act 1960 following which a land reference was made to the court under s 38 of the Act. About one-half of the land came within an area zoned for residential purposes and the remainder within a 'green belt area'. The principal issue in the reference was as regards the amount of compensation rightly payable to the applicants for the land. Expert evidence regarding the fair market value of the land was tendered by the applicants and by the respondent. The private surveyor who gave evidence for the applicants also stated that in his opinion, as the applicants had also incurred consequential loss in the employment of a firm of chartered surveyors for the purpose of the acquisition proceedings, a sum of $10,600 should be awarded as incidental costs.

Held, increasing the award for the fair market value of the land:

(1) Had the private surveyor adhered strictly or even substantially to the judicially acknowledged rule of using the comparable sales of the same land or similar lands of similar quality situated in the locality at or prior to the time of acquisition as the basis of his assessment, after making allowances for the differences in the various features, to arrive at his conclusion, the court could hardly dispute the correctness of his assessment.

(2) The underlying principle in the awarding of compensation for the compulsory acquisition of land is that an enhanced value of the land acquired which is derived from unrealized possibilities or potentialities must be determined only from the profitable use or future use of the said land to which it has been put at the time of the acquisition and not from any advantage derived from the purpose for which the land was acquired.

(3) The quality and quantity of rubber which a particular estate could produce must still be a significant factor in determining the sale price of a rubber holding, and in determining the extent of any increase in the prices of rubber lands to a particular holding the court cannot ignore the fact that the extent of the increase must inevitably be dictated by the yield of rubber from that particular holding.

(4) It had been said that common experience had shown that in areas where there is a small population the price per unit of area for a large parcel is less than the price per unit of a small parcel.

(5) It would no doubt be wrong in principle to give an award on the higher side for that part of the land which fell within the residential zoning area and another separate and lesser award for the remaining part. The correct method was to take this special feature of the land in assessing the fair market value of the land as a whole.

(6) The lot from which the land was acquired was over 500 acres in size and must consequently come within the restrictions imposed by s 214A of the National Land Code 1965, the effect of which was that the applicants would not be able to sell any part of the lot without the approval of the Estate Land Board established under that section. In the result a prospective willing purchaser of any part of the holding must consequently offer a price which is less than that of any rubber land not subject to s 214A.

(7) The element of accessibility to the land must be considered in the light of the potential development of the land as a residential area.

(8) The fact that part of the land was zoned for residential purposes could not be discounted by conjecture that the zoning could be altered by the appropriate authority.

(9) Valuations undertaken for the capital issues committee for general investment purposes can at the highest be utilized as an informative guide, and not as an indication of the price at which a willing seller would sell and a willing purchaser would buy the land in question.

(10) No evidence was led to show that the sum of $10,600 had in fact been incurred. Indeed in his submission, counsel for the applicants had not even touched on this matter. In the circumstances it was clear that the applicants had implicitly abandoned their claim to this sum and the court ruled so accordingly.

(11) The fair market value of the land was $11,990 per acre and judgment would be given for that sum minus the amount awarded by the respondent earlier.

Cases referred to

1 *Ng Tiou Hong* v *CLR, Gombak* [1984] 2 MLJ 35 (folld)
2 *Hock Lim Estate Sdn Bhd* v *CLR, Johore Bahru* [1980] 1 MLJ 210 (folld)
3 *Supt of Land and Surveys, Sarawak* v *Aik Hoe & Co Ltd* [1966] 1 MLJ 243 (folld)
4 *CLR* v *Alagappa Chettiar* [1971] 1 MLJ 43 (folld)
5 *Bukit Rajah Rubber Co Ltd* v *CLR, Klang* [1968] 1 MLJ 176 (folld)

Legislation referred to

Land Acquisition Act 1960 ss 4, 38, 48, First Schedule s 3(e)
National Land Code 1965 s 214A

Verghese George for the applicant.
Abdul Malik bin Haji Ishak (State Legal Adviser, Kedah) for the respondent.

Cur Adv Vult

Lim Beng Choon J: This is a land reference made under s 38 of the Land Acquisition Act 1960 (hereinafter referred to as 'the Act') in respect of the compulsory acquisition by the government of the State of Kedah of 20 acres of land (hereinafter referred to as 'the scheduled land') belonging to the Petaling Rubber Estates Ltd (hereinafter referred to as 'the objectors'). The holding from which the scheduled land was acquired was known as the Ladang Victoria Division comprising several lots of land with a total acreage of 2,890.37 acres, and lot 805 (now known as lot 878 - as a matter of convenience I shall hereinafter refer to the lot as 'lot 805'), held under grant no 2333 mukim Naga Lilit, Kulim with an acreage of 978.88 acres, was one of such lots. The scheduled land was acquired, as indicated in the Kedah gazette notification no 242 issued under s 8 of the Act, for the purposes of 'Tapak untuk rancangan perumahan awam kos rendah di Padang Serai Daerah Kulim'. The said notification was gazetted on 7 May 1981 and in accordance with the provisions of s 1(1) of the First Schedule to the Act, as no gazette notification under s 4 was ever published, that date is the material date to determine the fair market value of the objectors' property.

The land in lot 805 was categorized as agricultural land ' kebun getah' and it was situated slightly more than 1/4 mile from Pekan Padang Serai. It was accessible from the main road joining Pekan Lunas to Pekan Padang Serai and the land in lot 805 was mainly flat and it was almost of the same level as that of the road frontage. At the time of the acquisition, the scheduled land was planted with rubber RRM 603 which was more than 25 years old - see exh R2A. The scheduled land was rectangular in shape measuring about 660 ft in width and about 1,320 ft in depth. It was situated south of another portion of land in lot 805 comprising three acres which had earlier been acquired by the government on 10 October 1974 and on which the government had constructed a building to house the Pusat Kesihatan Besar. A sum of $3,500 per acre was paid as compensation in the acquisition of the three acres of land.

While the northern half of the rectangular scheduled land was within the Kawasan Majlis Kerajaan Tempatan Kulim boundary, the southern half fell outside the boundary which had been zoned as a 'kawasan hijau' ('green belt') area - see exh R2.

An inquiry was held by the Collector of Land Revenue ('the CLR') on 14 December 1981 and he made an award in the sum of $150,000 on 8 February 1982 for the 20 acres of the scheduled land and that works out to $7,500 per acre - see Borang 6 in app D of the land reference record. Unfortunately the land reference record is incomplete in that it does not show whether any representative of the objectors had attended and raised an objection at the inquiry held by the CLR to consider the amount of compensation; neither does it show the grounds relied on by the CLR in arriving at his decision. Be that as it may, it would appear that one Cik Faizah bte Hj Hassan, a government valuer, who appeared in this reference proceeding as a witness (DW1), had compiled a valuation report (hereinafter referred to as 'the government valuation report') to assist the CLR in his inquiry - see app H of the land reference record. This report was compiled sometime in September 1981. There is, however, no indication as to whether the objectors had at the inquiry submitted a

valuation report compiled by their own valuers to rebut the government valuation report.

Prior to the hearing of this reference, the objectors engaged CH Williams, Talhar and Wong Sdn Bhd to assess the market value of the scheduled land. A chartered surveyor of the firm made an on-site inspection of the scheduled land on 12 October 1981 and he had also carried out certain investigations. As a result, a valuation report (hereinafter referred to as 'the private valuation report') was compiled on 4 November 1981. The said valuation report was tendered as evidence through the maker, one Encik P'ng Soo Theng, who also gave evidence for the objectors. From the private valuation report, it was stated that the method adopted by Encik P'ng as the basis of the assessment involved a comparative study of sale of lands near or around the vicinity of the scheduled land prior to the time of the acquisition. Thereafter the prices paid for such sales were used as comparables subject to 'making appropriate adjustments for differences in terms of location, character of the neighbourhood, shape, terrain and size of the land, nature of cultivation, development potential and dates of relevant sales' - see p 8 para 12.0 of the private valuation report. Based on this method, he concluded that the fair market value of the scheduled land should be $20,000 per acre and the total amount for the 20 acres of scheduled land should come to $400,000. In addition, he was of the opinion that as the objectors had also incurred consequential loss in the employment of a firm of chartered surveyors, which expenditure would not have been incurred but for the acquisition proceeding, a further sum of $10,600 should be awarded as incidental costs. The objectors should therefore be awarded a total sum of $410,600. Needless to say that had the private surveyor adhered strictly or even substantially to the judicially acknowledged rule of using the comparable sales of the same land or similar lands of similar quality situated in the locality at or prior to the time of acquisition as the basis of his assessment, after making allowances for the differences in the various features, to arrive at his conclusion, one could hardly dispute the correctness of his assessment - see *Ng Tiou Hong* v *CLR, Gombak*[1] at p 37 (FC). The question therefore is did he practise what he had said? To answer this question it is necessary to examine with care not only the factors which he had taken into consideration in reaching his conclusion but also the factors which he ought not to have taken into consideration.

It is to be noted that firstly, it was stated in sub-para (a) of the third paragraph at p 10 of the private valuation report that the 'property is acquired for residential purposes, ie for low-cost housing which clearly indicates that it is very suitable for residential development'. When PW1 was being cross-examined on this point, he said that the low-cost housing scheme 'may propel development in the locality'. In making this statement, it is clear that the private surveyor had taken into consideration the fact that, since the scheduled land was acquired for a low-cost housing scheme, this would inexorably give an impetus to the residential development of the scheduled land thereby enhancing the market value of the said land. It is unfortunate that the private surveyor had failed to bear in mind the provision of s 3(e) of the First Schedule to the Act when he took into consideration the matters mentioned above. The said section provides that 'any increase to the value of the land acquired likely to accrue from the use to which it will be put when acquired' should not be taken into consideration in determining the amount of compensation to be awarded. In view of this provision, it is clear that the private surveyor had taken into consideration a matter which he ought not to have taken into account in assessing the market value of the scheduled land. The underlying principle in the awarding of compensation for the compulsory acquisition of land is that an enhanced value of the land acquired, which is derived from unrealized possibilities or potentialities, must be determined only from the profitable use or future use of the said land to which it has been put at the time of the acquisition, and not from any advantage derived from the purpose in respect of which the land was acquired. This proposition finds support from the judgment of Wan Suleiman FJ in *Hock Lim Estate Sdn Bhd* v *CLR, Johore*[2] where his Lordship tersely stated at p 211:

> It cannot be denied that apart from the increase in the value of the land acquired from the use to which it will be put when acquired (*a factor which cannot be taken into account when determining compensation*) there is evidence at least of some other industrial development already in progress, which would justify giving a portion adjoining the road a higher market value. (Emphasis is mine.)

This error on the part of the private surveyor is also clearly shown in the private valuation report at p 10 para (a) where it is stated that the maker had considered, inter alia, 'the fact that the scheduled land is suitable for residential development due to the following factor: (a) The property is acquired for residential purposes, ie for low-cost housing which clearly indicates that it is very suitable for residential development.'

Secondly, PW1 in his evidence indicated that he placed great reliance on the increases of the prices of rubber lands in the year 1980 to bring about a base figure for the purpose of assessment of the market value of the scheduled land. No doubt he took the price paid for the sale of the land comprised in the contiguous lots 264 and 265 as comparable, but in view of the general increases in the prices of rubber lands, he had made an upward adjustment to the comparable sale price to establish a base figure for the assessment of the market value of the scheduled land. It is to be noted that the sale transaction of the land comprised in lots 264 and 265 took place on 19 December 1979 and the acreage of the land in the two contiguous lots amounted to 400.30 acres. The sale price was $3,967,946.90

which works out to approximately $9,911 per acre. One half of the said land was cultivated with rubber of about seven years old while the remaining half was cultivated with oil palms interpersed with cocoa. The land was sold as an agricultural holding.

In his evidence, PW1 said that there was a general increase of 20% to 30% in the prices of rubber lands in the year 1980. To back up the evidence of PW1, learned counsel for the objectors extracted two pages out of a report entitled 'The Property Market Report 1980' compiled by the Ministry of Finance which was released on 29 May 1981 and forwarded them together with his written submission. It was stated in the opening passage of the said report that the prices of rubber lands showed an increase of 20%-50% especially around the Kulim and Kuala Muda area in Kedah. However, it went on to state that 'the prevailing high price for rubber coupled with the poor returns from the oil palm industry helped to push rubber land prices up by 20% to 30%'.

Taking the upsurge of the prices of rubber lands into consideration, the private surveyor thereby adjusted the sale price of the land in lots 264 and 265, which he utilized as a comparable, upwards by 35%. I cannot agree with the adjustment which to my mind was made rather arbitrarily and I say so for the following reasons.

Accepting that there was a general increase of 20% to 30% in the prices of rubber lands in 1980, nonetheless it is a fallacy to assume that every single rubber holding situated within Kulim and Kuala Muda, Kedah must necessarily benefit by an increase of the same extent without regard to the quality and quantity of the yield of rubber which a particular estate could produce. Putting it another way, the quality and quantity of rubber which a particular estate could produce must still be a significant factor in determining the sale price of a rubber holding, and in determining the extent of any increase in the prices of rubber lands to a particular holding, one cannot ignore the fact that the extent of the increase must inevitably be dictated by the yield of rubber from that particular holding. Bearing in mind that the land in lot 805 was cultivated with rubber trees of 25 to 30 years old, the yield of rubber from the said holding must invariably be relatively on the lower side as compared with the yield of rubber from the land in lots 264 and 265 which was planted with rubber trees of seven years old. Indeed, PW1 himself acknowledged this fact when he said in his evidence that 'rubber trees of 13 years (are) best for tapping'. His assertion was substantiated by a passage of the government valuation report (see p 5 of app H of the said report in the land reference record) in which the government valuers had listed out the prices of rubber lands based on the age of the trees grown therein when the respective lands were to be sold as agricultural holdings. Thus it was stated in that passage that:

(a) land with an acreage of 537.90 acres grown with rubber trees of 7 to 12 years would fetch a price of $5,600 per acre;

(b) land with an acreage of 698.14 acres cultivated with trees of 25 years plus could be sold for a price of $5,000 per acre.

It therefore perplexes me as to how PW1 could have arrived at the conclusion that a 35% plus factor should be added to the sale price of $9,911 per acre of the comparable land in lots 264 and 265 in order to reflect the value of the objectors' property, particularly when the yield of rubber from the former holding which was cultivated with prime mature trees must be relatively higher than the yield from the objectors' holding which was grown with old trees. Furthermore, I think it is not unfair to say that PW1 had directed his mind only to the general increase of 20% to 30% of the prices of rubber lands in 1980 without regard to the element of the yield from each holding and arbitrarily selected the midpoint of the percentage of the general increase to arrive at 25% to which he added a further 10% for the time lapse of one and a half years to reach the final percentage of increase by 35%. To my mind, PW1 had oversimplified matters in arriving at such a conclusion in that he had worked on the presumption that the general increase must apply to all rubber holdings without the need to take into consideration the condition of the trees grown in any particular holding and the consequential yield from such holding. This factor should and, indeed, must be taken into account, especially when, in adjusting the sale price of the comparable land upwards by 35% and applying the enhanced price to the land in lot 805, he was not concerned with the development value of any of the holdings in question and he was only concerned with the then existing value of the land in lots 264 and 265 as an agricultural holding; it was on this 'agricultural holding value' that he adjusted the sale price of the said holding upwards by 35%. In omitting to take into consideration the condition of the trees grown in the respective holdings and the consequential yields from the said holdings, I have no doubt that the private surveyor had erred in arriving at the enhanced sum of $13,300 as the base figure to assess the market value of the scheduled land. To compound his error, it is also important to note that the private valuer had also failed to take into account that the size of the holding under lot 805 was twice the size of the holding under lots 264 and 265. It has been said that 'common experience has shown that in areas where there is a small population the price per unit of area for a large parcel is less than the price per unit of a small parcel' - see *Supt of Land and Surveys, Sarawak* v *Aik Hoe & Co*[3] at p 246. On this point, the plaintiff in his evidence asserted that such a proposition could only apply if one were to compare a small estate of one to ten acres with another of 100 plus acres and not where, as in the present case, the size of an estate was only double the size of another holding.

PW1 might well be right as regards large parcels situated in densely populated areas where there is a large capital surplus and where the parcels of land are within easy reach of major towns. But in my judgment, he could not be right as regards the two holdings in question, situated as they were in an area surrounded by agricultural holdings with a small population and at quite some distance from any major towns. It is, therefore, my considered opinion that the proposition laid down in *Aik Hoe*'s case[3] should also apply, albeit to a lesser extent.

Turning to the evidence relied on by the private valuer in evaluating the development potential of the scheduled land, it is to be noted that he took into account three factors:

(1) since the property of the objectors was acquired for the purpose of a low-cost housing scheme, it is a clear indication that the scheduled land was very suitable for residential development;

(2) the potentialities of the scheduled land for residential development were enhanced as nearly the whole of it was within the boundary of the Majlis Kerajaan Tempatan Padang Serai, Kulim; and

(3) the scheduled land was within walking distance of the town centre of Padang Serai where residential development was being carried out and would continue to be carried out.

If, as I have explained elsewhere in the judgment, the factor on which the private surveyor had grounded his proposition that the scheduled land was ripe for residential development was because of the purpose for which acquisition of the scheduled land by the government was made, he ought not to have taken that factor into consideration by virtue of s 3(e) of the First Schedule to the Act. I need not labour any further on this point except to say that the provisions of the said s 3(e) clearly spelt out that such a factor should not be taken into consideration in assessing the market value of the scheduled land. Quite apart from this proposition, there is also no sufficient evidence to support factor (1). Indeed PW1 himself had said in his evidence that he did not see any sign of residential development taking place 'south of Pusat Kesihatan Besar' where the scheduled land was located. His evidence lends support to the following passage appearing in the government valuation report (see p 8 of app H in the land reference record): 'Mengambilkira perkara-perkara 10.1-10. 5 di atas saya berpendapat potensi pembangunannya dalam pasaran terbuka tanpa ada campur tangan (usaha) kerajaan, adalah dianggap 'remote'.' In arriving at such a conclusion the government valuer had taken into account, inter alia, that (i) part of the land in lot 805 was within the area zoned as 'kawasan hijau' (green belt area) and no residential development could be carried out in the land in the said area; (ii) the objectors' property carried with it an expressed condition of 'agriculture - kebun getah', and hence the lands comprising the objectors' property could not be used for residential development without the objectors applying to the appropriate authority for the change of use; and (iii) the potentialities of residential development of the scheduled land could only gain 'momentum' from the government intervention in the construction of schools and the implementation of the low-cost housing scheme.

With regard to factor (2), a cursory glance of the plan marked as the respondent's exh R2 is sufficient to convince me that about one-half of the scheduled land fell within the Majlis Kerajaan Tempatan boundary zoned for 'residential' purpose and the remaining half came within a 'green belt' area. DW1 in her evidence asserted that land within such area could only be used for agricultural purpose. It would no doubt be wrong in principle for the government valuers to give an award on the higher side for that part of the scheduled land which fell within the residential zoning area and another separate and lesser award for the remaining part (see for instance the case of *CLR* v *Alagappa Chettiar*[4] at p 46). However, the government valuers did not in their assessment adopt such a method. They merely took into consideration this special feature, which they rightly did, in assessing the fair market value of the scheduled land as a whole - see *Ng Tiou Hong*'s case[1] at p 37. On the other hand, PW1 had overlooked this important feature and erroneously held that the whole of the scheduled land was zoned for residential purpose.

As to factor (3), PW1 in the private valuation report (see p 6 of exh 01) admitted that the township of Padang Serai was mainly an 'agricultural town' and it was situated some 24 miles southeast of Sungei Petani and almost 11 1/2 miles north of Kulim. Nevertheless, he implicitly suggested in the said report that the potentialities of residential development in that township could not be ignored and that this factor which was of some significance must be taken into consideration in assessing the market value of the scheduled land. I do not think anyone could quarrel with this proposition if, but only if, there is evidence to support the fact that the potentialities of the residential development in or around Padang Serai did exist at or prior to the acquisition. The findings of the private surveyors on this point as contained in pp 6 and 7 of exh 01 may be summarized as follows: although a greater part of the town consisted of old pre-war double-storey shophouses, nevertheless, a dozen units of double-storey shophouses and a few three-storey shophouses were currently under construction. More importantly, it was stated that Padang Serai had low-cost housing schemes and 'an existing housing estate consisting of modern terrace and semi-detached houses plus a number of double-storey terrace houses currently under construction as well

as Malay and Chinese style houses'. In his oral evidence, PW1 did not mention much about the potentialities of the residential development of Padang Serai, apart from saying that the scheduled land was 'nearer to the town centre (of Padang Serai) when compared with the existing housing estate of Padang Serai'. On the other hand, the government valuers in the government valuation report (see p 8 of app H in the land reference record) stated that the residential development of Padang Serai was not of much significance. According to them, the development in that town was carried out by only one developer, namely, the owner of the Sky Theatre of Padang Serai who had constructed some ten units of shophouses in the town in 1975 and also some 10 to 20 units of residential houses at the outskirts of the town. In the evidence, DW1 said that the growth of Padang Serai township was at a slow rate as there were only pre-war shophouses in the town centre, one housing estate, a cinema and 'basic amenities' like a 'police station and a health clinic'.

Her evidence has not been challenged. What is more important, however, is that Padang Serai was mainly an agricultural town and whatever residential development that was being carried out at the material time was done by a local resident, namely, the owner of the Sky Theatre, on a relatively small scale. After a careful scrutiny of the evidence regarding the residential development of Padang Serai, I am satisfied that the position of the residential development of this township at the time of or prior to the acquisition could not have been of any great significance. The potentialities of the residential development of this town likewise were insignificant.

Lastly, one important matter which the private valuers had deliberately ignored is the fact that the land in lot 805 consisted of over 500 acres and must consequently come within the restrictions imposed by s 214A of the National Land Code 1965. The private valuer had glossed over this important matter and chose instead to highlight that the objectors' properties were not subject to the provisions of the Malay Reservation Enactment 1930. It might well be true that the restriction imposed by the said s 214A of the National Land Code 1965 cannot be equated with the strict prohibition imposed against any dealings with lands located within a Malay reservation but, nevertheless, the said s 214A must have a detrimental if not a crippling effect on the prospective sale of any part of lot 805, since the objectors would not be able to sell such part without the approval of the Estate Land Board established under that section. It is equally important to note that the said Board has wide powers to impose any restrictions or conditions on an application to sell any part of a holding which is not less than 40 hectares including the power to refuse an application on the ground of public interest. No willing purchaser of any part of the land comprised in the Ladang Victoria Division would have failed to take note of the fact that the land in the said holding including that in lot 805 was subject to the said section. In the result, a prospective willing purchaser of any part of the holding must consequently offer a price which is less than that of any rubber land not subject to s 214A. This proposition finds support from the following passage of the judgment of Suffian J (as he then was) in *Supt of Lands and Surveys, Sarawak* v *Aik Hoe & Co Ltd*[3] at p 251: '... they omitted (they were not asked) to consider the effect on the market price a willing purchaser would be prepared to pay, of the risk of refusal or delay of subdivision permission'. The only way to circumvent the provision of the said s 214A was to sell the holding of Ladang Victoria Division as a whole without fragmentation.

Turning to the assessment carried out by the government valuer, there is no doubt that in evaluating the market value of the scheduled land, she was to some extent influenced by the age of the trees planted thereon. Thus she said in her evidence: 'Based on valuation done in March 1981 we valued rubber trees between the ages of 13 and 18 years at $6,200 per acre. We put the value of rubber trees of 25 years and above at $5,000 per acre.' This method of assessment was strongly criticized by learned counsel for the objectors when he stated in his submission that: 'Irrespective of whether the crops on the land are just planted, mature or old or waning (trees), the value of (the) land is dictated by the fact that it can be cleared and used and developed (exploited) for better returns at the will of the owner of the land at any time.' I would agree with counsel if and only if the government valuer had completely overlooked the residential development potentialities of the land in lot 805 and assessed the market value based solely on its existing value. Thus in *Bukit Rajah Rubber Co Ltd* v *CLR, Klang*[5] at p 80, it was firstly said that 'no hard and fast rule can be laid down regarding the method to be adopted for assessing the proper market value of the land acquired, and in the last analysis each case must be considered in the light of its special feature'. The learned judge then went on to say:

> In the light of these observations I take the view that the proper method to arrive at a fair market value of the land acquired, taking all relevant considerations, is to assess its *existing value* with its inseparably essential element, ie its potential development value. (Emphasis is mine.)

In the present case, however, DW1 did consider the element of the potential development value although she did make two errors in considering this element. In the first place, she was of the view that the question of accessibility in respect of agricultural land was not as important as in the case of land needed for residential purposes. In holding this view she had overlooked the fact

that the element of accessibility must be considered in the light of the potential development of the said land. The element of accessibility must surely be an equal, if not a more important, factor in determining the potential development of the scheduled land as a residential area. In the second place, DW1 also misdirected herself when she said that although part of the scheduled land came under the town council boundary zoned for residential purpose, nevertheless, the zoning could be altered by the appropriate authority. Needless to say that such a proposition is based entirely on conjecture and must be rejected. Finally, most of the comparables utilized by her in assessing the fair market value of the scheduled l and were not derived from the sale prices of the comparable lands but rather from valuations made by officials of the department as directed by the capital issues committee for general investment purpose. Hence such valuations can at the highest be utilized as an informative guide and not as an indication of the price which a willing seller would sell and a willing purchaser would buy the land in question. The only useful comparable utilized by DW1 was the sale price of Ladang Bukit Lembu comprising 1,865 acres. However, the disadvantage in using the sale of this holding as a comparable is that it was located quite some distance from the scheduled land. And what is more important is that the sale transaction in respect of Ladang Bukit Lembu took place in 1979, that is to say, before the general increase of the prices of rubber lands which took place only in the year 1980. However that may be, DW1 in her evidence admitted that a more useful comparable would be the sale price of the land comprised in lots 264 and 265 (contiguous lots).

For the above reasons, it is therefore necessary for this court to make its own assessment of the fair market value of the scheduled land based on the evidence placed before it.

Firstly, I think the sale price of the land in lots 264 and 265 can safely be used as comparables since it appears to me that there is no serious dispute over this issue by the government valuer. At any rate, no other sales transactions of neighbouring lands can be usefully used as comparables. Secondly, as I have stated earlier in this judgment, the private valuer, PW1, had misdirected himself in adjusting the sale price upwards by 35% in that he had failed to take two important factors into consideration, namely, (i) the type and age of the trees grown in lots 264 and 265 which would give a better yield as compared with the trees planted in lot 805; and (ii) the acreage of the holding under lots 264 and 265 comprising only 400 plus acres would attract more purchasers who would be prepared to offer a better price as compared with that of lot 805 comprising 900 plus acres. These factors would, to a certain degree, render lot 805 less valuable and marketable than lots 264 and 265. I am therefore of the view that the percentage of increase brought about by the general increases of prices of rubber lands in 1980 should not exceed 10% and I arrived at this percentage in this way. Bearing in mind that the general increase of the price of rubber land was between 20% to 30% and that the rubber trees planted in lot 805 were more than 25 years old I think it is fair to rate the percentage of increase for the one and a half years as no more than 20%. A further deduction of 10% should be made in view of the fact that lot 805 had a less marketable advantage brought about by the size of its holding (twice the size of lots 264 and 265). The proper percentage of increase should therefore be no more than 10% for the period of one and a half years. To fortify my conclusion, it is to be noted that the land in lot 2790 comprising 132 plus acres planted with rubber trees of 24 years old was sold on 14 June 1981 at $10,974 per acre which works out to about higher than the sale price of lots 264 and 265 (see app D3 in exh OS). In the result, the base figure that should be used in assessing the fair market value of the scheduled land is $9,911 plus 10% of $9,911 which would come to $10,900 (round figure) per acre.

The following adjustments will have to be made to the base figures:

(i) as lot 805 was located about 1/4 mile from Padang Serai where some residential development was being carried out at the material time albeit on a small scale, I would give a plus factor of 10%;

(ii) as lot 805 had a main road frontage which renders it easily accessible, I would give a plus factor of 20%;

(iii) as regards the encumbrance created by s 214A of the National Land Code 1965, I would allow a minus factor of 20%.

In the ultimate analysis therefore, there should be an increase of 10% over and above the base figure of $10,900. In the result the fair market value of the scheduled land is $11,990 per acre. The total amount should therefore be $239,800 for the 20 acres of the scheduled land.

With regard to the further sum of $10,600 purported to have been paid to the chartered surveyors, no evidence was led to show that such sum had in fact been incurred. Indeed in his submission, counsel for the objectors had not even touched on this matter. In the circumstances it is clear to me that the objectors have implicitly abandoned their claim to this sum and I ruled so accordingly.

Judgment is therefore given to the objectors for the sum of $239,800 minus the sum of $150,000 awarded by the CLR earlier. The respondent will have to pay interest

at the rate of 8% pa under s 48 of the Act in respect of the excess sum of $89,800 from the date the CLR took possession of the land until the date of payment of the excess sum. The deposit (if any) lodged under s 39 of the Act shall be refunded to the objectors who are also entitled to costs to this land reference proceeding. I further direct that each assessor shall receive a fee of $100 per day for the three days' hearing of this reference which will have to be paid by the respondent. Finally both assessors fully concur with this judgment.

Order accordingly.

Solicitors: *Zain & Co.*

Reported by *PS Ranjan*

Dato' Au Ba Chi & Ors v Koh Keng Kheng & Ors

HIGH COURT (MUAR) - CIVIL SUIT NO 75 OF 1978
EUSOFF CHIN J
25 OCTOBER 1988

Evidence - Document in agreed bundle - Document included in agreed bundle due to oversight of previous solicitors - Whether privileged communication - Interlocutory application to remove document and expunge evidence relating thereto - Whether privilege waived - Whether express consent of defendants obtained for disclosure of document - Evidence Act 1950, ss 126, 127, 128 & 129

In the course of the trial of this suit, the first plaintiff in his evidence referred to a document found at p 13 of the agreed bundle of documents. The document was a communication between the first ten defendants and their original solicitors and had been included in the bundle due apparently to an oversight by the previous solicitors who had taken over the case from the original solicitors. During the adjournment the 14 defendants filed a joint interlocutory application to have the document removed from the bundle and all references to the said document by the first plaintiff in the notes of evidence taken at the hearing expunged on the grounds that the document was a privileged communication between solicitor and client and no express consent had been given by the defendants to disclose the contents of the document.

Held, allowing the defendants' application:

(1) The document, being a document containing instructions from the defendants to their solicitors, is a privileged document and cannot be disclosed to anyone except with the express consent given by each of the defendants.

(2) Even if the defendants' solicitors had given the document to the first plaintiff in the presence of all the defendants (which was disputed by the defendants), the fact that none of the defendants had objected to it, or that all had remained silent, did not constitute waiver of the privilege since the law requires that the defendants must give their express consent to their solicitors before the document could be disclosed to anyone.

(3) Since the document is a privileged document being communication between solicitors and clients and express consent for its release to anyone had not been given by the defendants to their solicitors, the document could not be released to the first plaintiff, and it should be excluded from the bundle of documents, and any evidence relating to its contents so far adduced in court should be expunged from the court record.

[*Editorial Note*: The plaintiffs' appeal to the Supreme Court vide Civil Appeal No 184 of 1988 was heard and dismissed on 24 May 1989.]

Case referred to
1 *Bullock* v *Corry & Co* (1878) 3 QBD 356 (refd)

Legislation referred to
Evidence Act 1950 (Rev 1971) ss 126, 127, 128, 129

Shao Kam San for the plaintiffs.
Ng Seng Kang for the first and second defendants.
Ong Chee Seong for the third defendant.
Daniel Tay Choon Beng for the fourth defendant.
Chua Su Yin (Ms) for the fifth to ninth, thirteenth and fourteenth defendants.
Lee Buck Heng for the tenth and eleventh defendants.
E Ramasamy for the twelfth defendant.

Cur Adv Vult

Eusoff Chin J: In the course of the trial of this suit, reference was made by the first plaintiff, Dato' Au Ba Chi, to a document found at p 13 of the agreed bundle of documents. An application was filed by way of notice of motion by the six counsel for the 14 defendants to have this p 13 expunged from the bundle of documents, and evidence of PW1 referring to this document at p 13 ABD be expunged from the notes of evidence. The application was an open court application but heard in chambers. The order granted was extracted as an open court order.

The impugned document was signed by the defendants and given to their former solicitors T Thalayasingam & Co on 5 November 1972 [date uncertain]. The document is worded as follows:

> We, the undersigned being the co-owners of the land held under grant no 2936, for lot no 375, township of Bandar Penggaram, Batu Pahat to the extent of 461189300/483189300 undivided shares, do hereby acknowledge receipt of the sum of dollars thirty five thousand only ($35,000) from Thalayasingam & Co, 8 Jalan Edrus, Batu Pahat by means of their cheque no 491756 on OCBC Ltd, Batu Pahat in favour of Khern Seng Chye and Chua Keng Sam subject to the following terms and conditions:
>
> a That we agree to sell our 461189300/483189300 undivided shares in the land held under grant no 2936 for lot no